

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

BALFOUR BEATTY COMMUNITIES, LLC

Employer

and

Case 28-RC-152809

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO, LOCAL 953**

Petitioner

DECISION AND DIRECTION OF ELECTION

International Union of Operating Engineers, AFL-CIO, Local 953 (the Petitioner) seeks to represent a unit of all full-time general maintenance technicians (turns) and general maintenance technicians performing work orders (work orders technicians) employed by Balfour Beatty Communities, LLC (the Employer) at its El Paso, Texas facility located at Fort Bliss Army Base (Fort Bliss), where the Employer provides maintenance and property management services for privatized military family housing. At hearing, the parties agreed to include assistant maintenance supervisors in the petitioned-for unit. The Employer urges that the appropriate unit should also include parks attendants, and roads and grounds employees employed by the Employer at its El Paso, Texas facility.

A hearing officer of the Board held a pre-election hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. As described below, based on the record and relevant Board cases, including the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enf'd. 727 F.3d 552 (6th Cir. 2013), I find that the petitioned-for unit limited to the Employer's full-time assistant maintenance supervisors, general maintenance technicians (turns) and general maintenance technicians performing work orders (work orders technicians) is appropriate.

The Employer's Operations

The Employer is engaged in commerce within the meaning of Section 2 (6) and (7) of the National Labor Relations Act. The Employer is a Delaware limited liability company with offices and places of business located throughout the United States, including an office and place of business located at Fort Bliss in El Paso, Texas, the only operation involved herein, where it provides maintenance and property management services for privatized military family housing.

The petitioned-for unit is comprised of 10 or 11 turns and 20 or 21 work orders technicians. When a house is abandoned for whatever reason (e.g., military family moves out), turns refurbish the house. This refurbishing includes electrical, carpentry, painting, plumbing, and just about any other type of work needed to maintain a home in habitable condition. Turns effectively “turn over” the house for a new military family to occupy. Work orders technicians perform the same type of work turns do, except they perform these duties on actively-occupied houses.

Maintenance technicians – turns and work orders technicians – do not have to have any sort of certification or license requirement when hired. However, some turns are HVAC (Heating, Ventilation, and Air Conditioning) certified, and at least one turn has a back flow certification for plumbing. It is unknown which employees have electrician licenses or any other sort of licenses, but employees are not required to be licensed to be hired by the Employer.

Additionally, there is interchange among work orders technicians based on the type of work they perform (plumbing, electrical, etc.), whereas turns are more specialized in certain areas. For example, some turns are simply inspectors and others, as many as two or three, strictly specialize in painting or dry wall repair. One of the turns occasionally performs plumbing work as well. The record reflects there is at least one turn who was previously employed as a work orders technician and that there is occasional interchange between turns and work order technicians.

Work orders technicians usually only work when a family calls in for a repair. As such, aside from their regular work schedule, work orders technicians are also on-call in case of emergencies. The performance of these on-call responsibilities rotate among work orders technicians. Turns generally do not take part in the on-call rotation, but if work orders technicians are not available or are shorthanded for any reason, turns are placed in the on-call rotation. Work orders technicians have two different shifts: 8:00 AM to 5:00 PM and 1:00 PM to 10:00 PM, along with the rotating on-call schedule. Conversely, turns only have one shift running from 8:00 AM to 5:00 PM. The rate of pay for both types of maintenance technicians is between \$15 and \$20 per hour.

The Employer seeks to add parks attendants, and roads and grounds employees to the petitioned-for unit. These employees handle and work on certain aspects of the Employer’s operation at Fort Bliss. For example, parks attendants and roads and grounds employees have similar jobs, with one notable difference being that parks attendants work on the grounds of parks located throughout Fort Bliss for the use of its residents¹; and roads and grounds employees work in the streets and public areas adjacent to residential locations throughout the base.² Both classifications are responsible for landscaping maintenance – in parks and near

¹ Parks attendants have more specialized knowledge in terms of irrigation and lawn equipment due to the specific work they tend to; roads and grounds employees can be versed in these areas as well, but usually have a wider range of experience.

² However, parks attendants and roads and grounds employees are both charged with overseeing the operations of more than 80 parks located within Fort Bliss.

residential housing – and, in doing so, they cut grass, trim bushes, and repair equipment needed for grounds keeping such as sprinkler systems.³

At hearing, the parties agreed that the six assistant maintenance supervisors should be included in the petitioned-for unit. The parties agreed that assistant maintenance supervisors did not exercise any indicia of supervisory authority to establish they were statutory supervisors under Section 2 (11) of the Act as they did not have any authority to hire, fire, or discipline employees, and they reported to the same maintenance supervisors who supervised the maintenance technicians. Moreover, though assistant maintenance supervisors occasionally filled in for maintenance supervisors, this only happened at most twice a month and was not a regular or scheduled occurrence.

Maintenance technicians, parks attendants, and roads and grounds employees all wear the same uniform that consists of a polo t-shirt and dark blue pants. Additionally, all the classifications begin and start their workday from the same maintenance building; undergo the same basic training; are provided practically the same equipment by the Employer; receive the same employee handbook; are paid within the same pay scale (\$15 and \$20 per hour) and receive similar benefits; and have somewhat similar work schedules. Neither parks attendants nor roads and grounds employees share on-call responsibilities with maintenance technicians. Further, the job duties of parks attendants and roads and grounds employees are limited to parks, streets, and other public areas within Fort Bliss and these classifications are never tasked with working on individual homes.

Board Law

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an “overwhelming community of interest” with those in the petitioned-for unit. *Specialty Healthcare*, supra, slip op. at 7.

Thus, the first inquiry is whether the job classifications sought by Petitioner are readily identifiable as a group and share a community of interest. In this regard, the Board has made clear that it will not approve fractured units: combinations of employees that have no rational basis. *Odwalla, Inc.*, 357 NLRB No. 132 (2011); *Seaboard Marine*, 327 NLRB 556 (1999). A consideration in the first inquiry is whether the employees sought are organized into a separate department or administrative grouping. The Board also considers whether the employees sought by a union have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job

³ Parks attendants are also responsible for the maintenance and upkeep of recreational equipment (e.g., swings) used at each park.

overlap between classifications; the functional integration with the Employer's other employees; the frequency of contact with other employees; the amount of interchange with other employees; distinct terms and conditions of employment; and separate supervision. *United Operations, Inc.*, 338 NLRB 123 (2002); see also *Specialty Healthcare*, supra, at 9.

With regard to the second inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate basis upon which to exclude [the] employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Specialty Healthcare*, supra, at 11-13, and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip. op. at 3, fn. 8 (2011).

Application of Board Law to the Facts of this Case

The Classifications Sought By Petitioner Share a Community of Interest

The Employer does not contend that employees in the petitioned-for unit do not share a community of interest. Rather, the Employer contends that the smallest appropriate unit must include the petitioned-for employees as well as assistant maintenance supervisors, parks attendants, and roads and grounds employees.

The evidence shows that the petitioned-for maintenance technician employees share the same type of skills and training; perform the same type of work; are paid roughly the same hourly rate of pay; are supervised by the same classification of manager (maintenance supervisors); are subject to occasional interchange; undergo the same type of basic training; wear the same type of uniforms; and, most importantly, are both charged with performing the maintenance and upkeep of occupied and unoccupied military housing.

With regard to the six assistant maintenance supervisors that the parties agreed should be included in the petitioned-for unit, I find that they are not statutory supervisors since substituting for managers sporadically or irregularly is not sufficient to establish supervisory status. *Stewart & Stevenson Services, Inc.*, 164 NLRB 742 (1967); *Aladdin Hotel*, 270 NLRB 838, 840 (1984) (assistant maintenance supervisors do not spend "a regular and substantial portion of their working time performing supervisory tasks"); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006).

In concluding that the employees in the petitioned-for unit of assistant maintenance supervisors and maintenance technicians are "readily identifiable as a group," I find that they all operate within the same department and under the same administrative unit and share the unique function of performing maintenance work such as plumbing, carpentry, electrical, painting, and just about any other task that is needed to maintain the viability of occupied and unoccupied military housing. *Macy's Inc.*, 361 NLRB No. 4 (2014).

Moreover, the employees in the petitioned-for unit share an overwhelming community of interest under the Board's traditional criteria. In addition to working in the same

department, these employees are subject to common supervision by maintenance supervisors and their home maintenance work has a shared purpose and is functionally integrated. Although maintenance technicians are divided into two groups, the qualifications to be in either group are essentially the same in that there is no license or certification needed and all that is required is that a prospective employee needs to be well versed in some, or all, of the following categories: plumbing, carpentry, painting, or electrical work. Further, though some turns specialize in certain areas like painting or dry wall repairs, all turns and work orders technicians are similarly skilled and may be referred to any job that needs to be done in an occupied or unoccupied house. Also, there is occasional interchange and overlap that occurs among maintenance technicians when there are not enough work orders technicians to cover on-call responsibilities. In such circumstances, turns are placed on-call in case of emergencies. Lastly, the maintenance technicians perform a wide variety of skilled trades work and have particularized training in areas other employees do not. As a group, maintenance technicians are specifically tasked with the maintenance and upkeep of occupied and unoccupied military housing, and this is wholly different from working in parks and on streets. Maintenance technicians earn approximately the same amount of money and earn more than parks attendants or roads and grounds employees; are supervised separately from parks attendants and roads and grounds employees; undergo the same basic training; wear the same type of uniforms; and, most importantly, are the only employees charged with handling the maintenance and preservation of military housing at Fort Bliss. *DTG Operations, Inc.*, 357 NLRB No. 175 (2011), *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011).

Accordingly, I conclude that the employees in the petitioned-for unit share a community of interest and the petitioned-for unit is appropriate for the purposes of collective bargaining.

The Employees the Employer Contends Must Be Added to the Unit Do Not Share an Overwhelming Community of Interest with the Employees in the Classifications Sought by the Petitioner

I conclude that the employees the Employer seeks to add to the unit do not share an overwhelming community of interest warranting their inclusion with the unit employees sought by Petitioner. In reaching this conclusion, I find that parks attendants and roads and grounds employees work separately from the employees in the petitioned-for unit and perform distinct tasks and possess qualifications that are different from the petitioned-for employees. Parks attendants and roads and grounds employees are tasked with maintaining more than 80 parks located throughout Fort Bliss and ensuring that the streets and areas adjacent to residential locations are in proper and safe condition. Moreover, these employees are separately supervised by one single maintenance supervisor who does not supervise any other employees. At no time are parks attendants and roads and grounds employees responsible for the upkeep of occupied and unoccupied military housing. The evidence shows that parks attendants and roads and grounds employees perform very few, if any, of the maintenance jobs that are performed in these homes. Moreover, parks attendants and roads and grounds

employees do not have the required training or experience to perform such tasks.⁴ Thus, based on the evidence presented at the pre-election hearing, I find that parks attendants and roads and grounds employees make up a separate and readily identifiable unit of the Employer's operation at Fort Bliss that is different from the one associated with the unit of employees sought by the Petitioner.

Parks attendants maintain more than 80 different parks located within the residential community at Fort Bliss. Parks attendants' job responsibilities include mowing and landscaping, irrigation work, and making sure the parks located within the residential community are safe for the public. Likewise, roads and grounds employees perform very similar tasks to those done by parks attendants, the difference being that parks attendants work to preserve the parks within Fort Bliss, whereas roads and grounds employees not only work within the many different parks, but also make sure the streets and public areas within the community are in safe and proper condition.

Parks attendants and roads and grounds employees will occasionally have to repair playground or park equipment such as a swing set or sprinkler system, but these instances are only occasional and are never performed on individual homes. In fact, in contrast to maintenance technicians, parks attendants and roads and grounds employees never perform any work inside individual homes. Therefore, I find that the employees sought by the Employer to be included in the petitioned for unit do not share the same job duties, qualifications, or training requirements as the classifications sought by Petitioner.

There is rarely any interchange between parks attendants and roads and grounds employees and maintenance technicians. During the pre-election hearing, a turn technician testified that in five years with the Employer, he was asked to do roads and grounds work three times, and this was only due to some sort of emergency that had arisen, the exact details of which he could not recall. Alternatively, there is no evidence that parks attendants and roads and grounds employees perform any carpentry, painting, plumbing, or electrical work that is not associated directly with some aspect of park or road maintenance. The record disclosed only one instance of conversion from parks attendant to maintenance technician and only one instance where the classifications sought by Petitioner and Employer were even on the same work order, and, in this case, the roads and grounds employees were limited to picking up trash after the maintenance technicians performed their duties. Moreover, though all classification involved herein are paid between \$15 and \$20 per hour, the Employer's witness testified that maintenance technicians are paid slightly more than any parks attendant or roads and grounds employee.

Therefore, I find that the commonality between the petitioned-for classifications and the classifications the Employer contends must be added is extremely slight and that the two groups of employees do not share an "overwhelming community of interest." *Specialty Healthcare*, supra, slip op. at 7. In so finding, I recognize that the employees the Employer contends must be included in the unit share the same uniforms, receive the same basic training, are paid on an hourly basis and within the same pay scale, use vehicles supplied by the Employer, and have similar health and benefits packages as the classifications sought by Petitioner. While the Employer's contentions may establish that the broader unit may be

⁴ Parks attendants and roads and grounds employees are not, and do not have to be, skilled to perform carpentry, painting, plumbing, or electrical work.

appropriate, they are insufficient to establish that the parks attendants and roads and grounds employees share such an overwhelming community of interest as to require their inclusion in the petitioned-for unit when the classifications are so vastly different and readily identifiable.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time assistant maintenance supervisors, general maintenance technicians (turns), and general maintenance technicians (performing work orders) employed by the Employer at its facility at Fort Bliss Army Base, El Paso, Texas; excluding all other employees, including office clerical employees, managers, guards, and supervisors as defined in the National Labor Relations Act.

Additionally, the record also reflects the Employer once again raised its objection to the pre-election hearing and petition for the reasons expressed in its Motion to Dismiss filed on May 26, 2015. As thoroughly explained in the Order Denying Employer's Motion to Dismiss Petition (Order) on May 29, 2015, there was no merit to the Employer's arguments that the Union failed to comply with the service requirements in the Board's Rules and Regulations or that the filing of the petition was contingent on the Union making an offer of recognition to the Employer. For the reasons set forth in the previous Order and the evidence produced on the record, I am once again denying the Employer's Motion to Dismiss.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, LOCAL 953.

A. Election Details

The election will be held on June 11, 2015 from 7:00 AM to 1:30 PM at the Kelly Park Community Center located inside the Fort Bliss Army Base.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending June 5, 2015, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Tuesday, June 9, 2015**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by

department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14th Street NW, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Phoenix, Arizona, this 5th day of June 2015.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director



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Petitioner

Case 28-RC-152809

**AFFIDAVIT OF SERVICE OF: DECISION AND DIRECTION OF ELECTION DATED
June 5, 2015**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on June 5, 2015, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

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June 5, 2015

Date

Miguel Rodriguez, Designated Agent of NLRB

Name

/s/ Miguel Rodriguez

Signature